U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 October 2006

BALCA Case No. **2005-INA-187**
ETA Case No. P2004-NY-02509267

In the Matter of:

J W GENERAL CONSTRUCTION,
Employer,

on behalf of

WILMAN ACUNA,
Alien.

Certifying Officer: Dolores DeHaan
New York, New York

Appearance: Ted J. Chiappari, Esquire
New York, New York
For the Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] We base our decision on the record upon which the CO denied

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 25, 2001, Employer filed an application for labor certification on behalf of the Alien for the position of Carpenter. (AF 140-141). On March 22, 2005, the CO issued a Notice of Findings (NOF) indicating intent to deny the application on the ground that it did not appear that the Employer had made good faith recruitment efforts. To remedy the deficiency, the Employer was directed to document its attempts to contact the U.S. applicants and to document its lawful and job related reasons for rejecting the U.S. workers. (AF 61-63). The Employer timely submitted a rebuttal, which included telephone records, certified mail receipts, and detailed comments stating the grounds for rejecting the U.S. applicants. (AF 16-60).

On May 26, 2005, the CO issued a Final Determination denying certification because the itemized Nextel telephone records provided with the rebuttal displayed the Alien's name on the billing address. The CO concluded, therefore, that it was apparently the Alien who contacted and interviewed the applicants. The CO found that the Alien's participation in the recruitment process evinced a lack of good faith in recruitment requiring denial of labor certification. Because of this finding of lack of good faith, the CO concluded that she could not determine if the U.S. workers were rejected for lawful job-related reasons. (AF 14-15).

On June 21, 2005, Employer filed a request for review by this Board. (AF 1-13). The Employer stated that the telephone log submitted with the rebuttal included the following note:

> Please note that the accounted name listed on the telephone records is the name of William Acuna. For administrative reasons, J W Construction has allowed this account to continue to be in the employee's name. J W Construction covers all expenses for the use of this phone. The bills are all sent directly to the company's address at 590 West End Avenue, New York, NY. As indicated in the statement, Mr. Julian Ceron [the Employer's president] conducted each of the interviews.

Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

The Employer observed that the CO made no mention of this explanation in the Final Determination, and may have overlooked it. Accordingly, the Employer provided a sworn affidavit from the Employer's president that reiterates that he personally conducted the interviews, and which further explains the billing arrangement.

Following docketing by the Board, the Employer filed an appellate brief. In the brief, the Employer cited BALCA caselaw to the effect that the CO may not deny labor certification on a ground first raised in the Final Determination. *Prime Clinical Systems, Inc.*, 1988-INA-530 (Feb. 9, 1990); *Dr. Mary Zumot*, 1989-INA-35 (Nov. 4, 1991); *Copper Range Co.*, 1994-INA-316 (June 27, 1995).

DISCUSSION

Good faith recruitment and the Cell Phone

An alien's participation in interviewing and considering U.S. workers *per se* taints the labor certification process. *Master Video Productions, Inc.*, 1988-INA-419 (Apr. 19, 1989) (*en banc*); *Summit Enterprises, Inc.*, 1988-INA-448 (Oct. 20, 1989); *Eastern Trading Co., Inc.*, 1988-INA-144 (Aug. 4, 1988). Thus, in the instant case the CO was properly concerned when the rebuttal documentation showed the Alien's name on the Nextel billing invoices. However, the rebuttal did contain the explanation quoted above as to why the Nextel bills showed the Alien's name. (*see* AF 25) Moreover, we observe that the Nextel bills show the Employer's street address rather than the Alien's address. (*see* AF 27).

The Employer correctly argues (1) that the CO did not address this part of the rebuttal and (2) that the CO cannot base a Final Determination denying labor certification on an entirely new issue raised for the first time in the Final Determination. Thus, this panel cannot affirm the

CO's denial of labor certification on the ground that the Alien apparently made the phone calls to the U.S. applicants.[2]

Remedy for the Deficiency in the Final Determination

Generally, if a CO raises an issue for the first time in a Final Determination, the remedy is a remand for the CO to issue a Supplemental Notice of Finding to permit the Employer to address the new issue.

In *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc), however, the Board held that if the original NOF provided an employer with adequate notice of the violation and instructions for curing or rebutting the deficiencies, a less than fully reasoned Final Determination may not prevent the Board from affirming a denial of labor certification if the employer's documentation was so lacking in persuasiveness that labor certification necessarily would be precluded.

In the instant case, it was crystal clear that the Employer was required on rebuttal to address the issue of lawful rejection of U.S. applicants. The Employer clearly understood that this issue required rebuttal and presented a detailed statement specifying the grounds on which it rejected each of the eight U.S. applicants identified by the CO in the NOF. We have reviewed the Employer's rebuttal, and for the reasons stated in the next section of this opinion, have determined that the rebuttal was so lacking in persuasiveness, that a remand on the cell phone issue is unwarranted, because labor certification is precluded by the Employer's unlawful rejection of qualified U.S. applicants.

In its appellate brief, the Employer argues that the CO acknowledged that all of the candidates had been rejected solely for lawful, job related reasons based on the sentence in the Final Determination in which the CO stated: "Employer's rebuttal information ... addressed the qualifications of 8 U.S. workers cited in our Notice of Findings and did, in fact, further explain lawful job related reasons for the rejection of each of the 8 U.S. workers." However, in the last

[2] We make no finding on the persuasiveness of the Employer's explanation as to whether the Alien participated in the interviewing of U.S. applicants.

paragraph of the Final Determination the CO stated that because she had found lack of good faith in recruitment, she could not determine if the U.S. workers were rejected for lawful job-related reasons. Thus, in context, the sentence quoted by the Employer was only the CO's description of the rebuttal -- not a finding that the Employer had provided convincing rebuttal on the unlawful rejection issue. Rather, it is clear that the CO did not reach the issue of whether U.S. applicants were lawfully rejected.

Unlawful Rejection of U.S. Applicants

Section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful job-related reasons. In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991). Section 656.24(b)(2)(ii) applies where an applicant is competent to perform the job duties with a nominal period of on-the-job training even though he or she does not possess all of the stated qualifications. *Mindcraft Software, Inc.*, 1990-INA-328 (Oct. 2, 1991).

In the ETA 750A form, the Employer listed experience requirements of two years of experience in the job offered (described by the Employer as "carpenter, maintenance"), or two years of experience in the related occupation of carpenter. (AF 140, item 14). Other special requirements were listed as "Verifiable references. Own transportation (driver's license)." (AF 140, item 15). The duties for the job were described as "Construct, install, and repair structures and fixtures of wood, plywood, and wallboard, using carpenter's hand tools and power tools. Miscellaneous home improvement work as needed." (AF 140, item 13).

In the Employer's rebuttal to the NOF, it stated its grounds for rejecting the eight U.S. workers who the CO identified as qualified for the position. For purposes of this appeal, we will assume, without deciding, that the Employer lawfully rejected three applicants who assertedly

withdrew their applications, and two applicants who could not provide verifiable references.[3] We will also assume, without deciding, that one applicant was not available for full-time employment. We find, however, that the two remaining applicants were clearly qualified for the position and were unlawfully rejected.

U.S. applicant Powers applied for the job with an impressive resume showing 18 years of experience in carpentry, including work on high-end projects that had been featured in the New York Times Home and Design Section, Architectural Digest and an A&E television program. He reported that while his specialty was historic renovation and woodworking, he was fully experienced in tile, hardware, roofing and drywall, and had working knowledge in electrical, plumbing and HVAC systems. On various jobs from 1994 through the time of his application he had been the Site Super and/or Lead Carpenter on a series of renovation and new construction jobs. (AF 78-79).

The Employer rejected Powers because (1) he stated during the interview that he was seeking a supervisory position, and the Employer's position is not supervisory; (2) he stated during the interview that he was looking for projects in which he could use his design skills, and the Employer's position would not offer such opportunity; and (3) the applicant lacked the core skills of painting, plastering or taping. (AF 22). None of these grounds were credible or lawful grounds for rejection of Powers.

First, in regard to Power's expressed desires to obtain a supervisory position and to use his design skills, an employer may not assume that a U.S. applicant is not available for or is disinterested in the position offered merely because his or her career goals do not match the job offered. *J.J. Appelbaum's Deli Co.*, 1990-INA-475 (Jan. 30, 1992). Moreover, an employer may not reject a qualified U.S. applicant merely because it suspects that he or she may not remain in the position for long or merely because the applicant is overqualified; such a reason for rejection must be documented. *Listriani's Restaurant*, 1988-INA-380 (June 9, 1989) (en banc); *Metroplex Distributors*, 1988-INA-249 (May 22, 1989) (en banc); *Switch, USA, Inc.*, 1988-INA-164 (Apr.

[3] The way the rebuttal is worded it is unclear to this panel whether the U.S. applicants could not provide references at all, or only were unprepared when receiving the Employer's phone call to provide the references at the time.

19, 1989) (en banc). Similarly, an applicant's expression of concern about a low salary is not sufficient grounds for rejection of the applicant; rather, for the employer to lawfully reject a U.S. applicant on this basis the position must be offered to the applicant and the applicant then decline the position based on the low salary offered. *Martinez and Wright Engineering*, 1988 INA 127 (Oct. 28, 1988). *Impell Corp.*, 1988-INA-298 (May 31, 1989) (en banc). In the instant case, the Employer only reported that Powers was looking for a supervisory position; there is no assertion that he withdrew his application because the position was non-supervisory or would not meet his goal of using his design expertise, or that the Employer offered the job to Powers and he rejected it because it did not meet his salary requirements.

Second, in regard to Power's purported lack of experience in the skills of painting, plastering or taping, we note that painting was not listed as a job duty in the ETA 750A, that the ETA 750A only mentioned work involving wallboard and not plastering,[4] and that it is not credible that an Employer would reject an applicant with the master carpenter skills shown on Power's resume solely for lack of experience in taping wallboard joints. Moreover, Powers' resume states that he is fully competent in drywall and that prior to 1994 he was employed by a drywall company. We also observe that the ETA 750A stated that the Employer's job requirements were two years of experience in the job offered or in the related occupation of carpenter. Thus, even if Powers did not have direct experience in taping wallboard, lack of experience in this particular skill -- which undoubtedly could be learned by a master carpenter in a reasonable period of time -- was not a credible basis for rejecting Powers.

The Employer's grounds for rejecting U.S. applicant Posch were also lacking in credibility. The Employer stated that during its interview of Posch, "we found that [his] carpentry experience has been concentrated on the creation of artwork from wood." The Employer thus states that Posch's carpentry experience was different from that needed in the installation and repair of structures, and specifically fixtures of wood, plywood and wallboard. The Employer stated that Posch lacked the core skill of spackling. (AF 22). Posch's resume

[4] Installing and finishing wallboard is qualitatively distinct from plastering a wall. We take administrative notice that the O*Net lists plasterers (No. 47-2161.00) and carpenters (No. 47-2031.00) separately. If the Employer requirements including plastering, a combination of duties/unduly restrictive job requirement issue would have been presented.

does show that he had a great amount of experience with cabinet and furniture making, and that some of his experience was with an art gallery and a model maker. (AF 97). However, his resume specifically states that from 1997 to 2003 he "worked on site doing interior renovation of residential and commercial buildings, including sheetrock, painting, installing doors and windows." (AF 97). His cover letter states that he had "renovated buildings, from framing and sheetrock to painting, and have installed flooring, molding, doors and windows." He continues, stating that he had experience in building staircases, decks and cabinetry, and is competent in the full range of woodworking shop machinery, power tools and hand tools. (AF 96). Thus, Posch's resume does not indicate that his experience, although including some arts-related employers, did not include general carpentry. The Employer's assertion that Posch was, in effect, only an artist and not a skilled carpenter, is belied by his resume and appears to have been an invention of the Employer to attempt to find grounds for rejecting an otherwise well qualified U.S. applicant. As with the case of Powers' purported lack of experience with taping drywall, Posch's purported lack of experience with spackling is dubious, given that Posch's resume specifically states that he has experience with sheetrock. Moreover, even if Posch did not have experience with spackling, it is not credible to believe that the Employer would reject an otherwise well qualified applicant on this ground alone.

In sum, Powers and Posch presented resumes indicating that they were well qualified for a position as a carpenter for a company specializing in construction and home improvement, and the Employer failed to present credible, lawful, job-related reasons for their rejection. Even though the CO did not discuss the issue of unlawful rejection of U.S. workers in the Final Determination, the NOF clearly and specifically identified this issue and the Employer was provided a full and fair opportunity to present evidence and argument on this issue. We have reviewed that rebuttal evidence and argument and find that Powers and Posch were unlawfully rejected. Thus, we affirm the denial of labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.